IN THE FLORIDA SUPREME COURT

INQUIRY CONCERNING A JUDGE NO. 02-466 CASE NO.: SC03-1846
RE: JUDGE JOHN RENKE III

JUDICIAL QUALIFICATIONS COMMISSION'S RESPONSE IN OPPOSITION TO MOTION FOR REHEARING

The Judicial Qualifications Commission, by and through its undersigned counsel and pursuant to Florida Rule of Appellate Procedure 9.330, hereby responds in opposition to the Motion for Rehearing filed by Judge John Renke, III. The Motion for Rehearing appears to challenge the sufficiency of the evidence to support the Hearing Panel's findings of fact upheld by this Court as well as this Court's determination of appropriate discipline. To the extent it does the former, the motion is little more than an improper rehashing of arguments raised in Judge Renke's briefs. As reflected in the briefs filed herein and in this Court's opinion, the record fully supports the Hearing Panel's findings. To the extent Judge Renke challenges the discipline imposed, he challenges this Court's exclusive domain to determine appropriate discipline where it appears that the issue was fully considered by the Court. For these reasons, and those discussed below, the Motion for Rehearing should be denied.

I. THIS COURT'S OPINION REFLECTS CONSIDERATION OF BOTH THE STANDARD OF REVIEW AND GOVERNING PRECEDENT.

Judge Renke challenges the sanction imposed by alleging that this Court misapprehended "the standard of review in rejecting the recommended sanction and ordering removal" and "misapprehended the governing precedent of other similar cases in ordering removal." (Motion for Rehearing, pp. 2 and 5). Yet the opinion at issue clearly reflects contemplation of both points. (See Opinion dated May 25, 2006, pp. 20-26). Justice Wells' separate opinion concurring in part and dissenting in part demonstrates that the Court considered whether Judge Renke could be removed when the Hearing Panel of the Judicial Qualifications Commission did not recommend removal. It is plain that this Court carefully considered this issue, a matter within its exclusive province.

Pursuant to article V, section 12(c)(1) of the Florida Constitution, this Court has the discretion to accept, reject or modify the JQC's recommendation of discipline. In re Alley, 699 So. 2d 1369 (Fla. 1997). The ultimate power and responsibility to determine appropriate discipline for a judge rests with this Court. In re Angel, 867 So. 2d 379, 382 (Fla. 2004). Judge Renke's disagreement with the conclusion reached by a majority of the Court is not a basis for rehearing.

II. JUDGE RENKE IMPROPERLY REARGUES ISSUES CONCERNING THE HEARING PANEL'S FINDINGS OF FACT UPHELD BY THIS COURT AND FAILS TO DEMONSTRATE ANY ISSUE OVERLOOKED OR MISAPPREHENDED BY THIS COURT.

Judge Renke's second main argument for rehearing rests on his assertion that this Court "overlooked the role of the Hearing Panel as a neutral adjudicative body in rejecting, without discussion, important mitigating factors and in adding a new charge and finding of fraud." (Motion at p. 7).[1] Most of his argument, however, merely rehashes his challenge to the underlying findings of fact in connection with $95,800.00 in campaign contributions he received from his father.[2] This issue was extensively briefed by both parties and is fully addressed by this Court's opinion. (Opinion at pp. 11-20). This Court found "adequate evidentiary support" for the Judicial Qualification Commission's findings and conclusions in connection with these fees, holding that "there is clear and convincing evidence to support the JQC's conclusion that the payments to Judge

[1] Contrary to Judge Renke's assertion, this Court's opinion does discuss its rejection of "the mitigation proffered in this case." (Opinion at p. 25).

[2] Ironically, while quibbling with the Hearing Panel's findings of fact, Judge Renke simultaneously fervently urges the wisdom of the Hearing Panel's recommendations regarding discipline. In pressing the sanctity of the recommended discipline, Judge Renke identifies the Hearing Panel as a "neutral adjudicative body" that brings to the Court "eyes and ears" and consideration of witnesses' "sincerity, demeanor, tone and the relative credibility of competing witnesses" and is "uniquely qualified to evaluate the evidence." (Motion at pp. 2, 7, 8 and 9).

Renke were intended to be campaign contributions rather than earned income." (Opinion at p. 16).

It is improper for Judge Renke to attempt to re-litigate issues that were fully briefed and considered during the appeal; motions for rehearing are not intended to serve as a vehicle for mere re-argument. See, e.g., Barnes v. State, 743 So. 2d 1105 (Fla. 4th DCA 1999) (function of motions for rehearing is not to disagree with Court's conclusions or reargue matters discussed in briefs, or "to request the court to change its mind as to a matter which has already received the careful attention of the judges…"); Department of Revenue v. Leadership Housing, Inc., 322 So. 2d 7, 9 (Fla. 1975) ("An application for rehearing that is practically a joinder of issue with the court as to the correctness of its conclusions upon points involved in its decision that were expressly considered and passed upon, and that reargues the cause in advance of a permit from the court for such reargument, is a flagrant violation of the rule, and such an application will not be considered.").

As the Committee Notes to Rule 9.330 make clear,

> By omitting the sentence "The motion shall not re-argue the merits of the court's order," the amendment is intended to clarify the permissible scope of motions for rehearing and clarification. Nevertheless, the essential purpose of a motion for rehearing remains the same. It should be utilized to bring to the attention of the court points of law or fact that it has overlooked or misapprehended in its decision, not to express mere disagreement with its resolution of the issues on appeal. The amendment also codifies the decisional law's

> prohibition against issues in post-decision motions that have not previously been raised in the proceeding.

Fla. R. App. P. 9.330, Committee Notes, 2000 Amendment.

Moreover, Judge Renke's argument is belied by the record. Essentially he argues that the $95,800.00 payment from his father was not improper because either the fee (and therefore payment) was earned at the time, or Judge Renke thought it was earned. Yet the record reflects that the plaintiffs in the Driftwood litigation had a contingency fee agreement with the Renke firm and were not liable for paying any fees unless and until a recovery was obtained and the funds could be disbursed. The Driftwood settlement was not completed until the fall of 2003, thus the fees were not yet earned in 2002. Yet Judge Renke was paid in advance, as needed for his campaign. Even Judge Renke's "compensation expert" testified that the Driftwood fees were "not actually earned" until the fall of 2003, thus Judge Renke had not earned those fees, and could not reasonably believe that he had, at the time his father "paid" him in 2002.

Judge Renke also incorrectly asserts that this Court has made a new finding of fraudulent misconduct. In fact, this Court simply noted that "the series of blatant, knowing misrepresentations found in Judge Renke's campaign literature and in his statements to the press amount to nothing short of fraud on the electorate in an effort to secure a seat on the bench." (Opinion at p. 24). This is not a new or

separate charge or finding. Rather, it is merely a statement by this Court placing in context the significance of the knowing misrepresentations found by the Hearing Panel.

Judge Renke continues on rehearing to insist as he did in his briefs that it is improper to regulate and limit the content of political speech. (Motion for Rehearing, p. 18). Judge Renke fails to note, however, that the very case he cites, Brown v. Hartlage, 456 U.S. 45 (1982), recognizes that there is no constitutional protection for knowingly false and misleading speech. Id. at 60. See also Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ("But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues."). Moreover, the law is well established that deliberately misleading campaign speech is not excused on First Amendment grounds. See, e.g., In re Kinsey, 842 So. 2d 77 (Fla. 2003); Weaver v. Bonner, 309 F.3d 1312, 1319 (11th Cir. 2002) ("false statements are not entitled to the same level of First Amendment protection as truthful statements."). Thus, to the extent Judge Renke resurrects his First Amendment challenge to his prosecution and discipline, his argument remains without merit.

CONCLUSION

In short, Judge Renke fails to demonstrate any points of law or fact that this Court overlooked or misapprehended in its decision and therefore his Motion for Rehearing should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing **Judicial Qualifications Commission's Response in Opposition to Motion for Rehearing** has been furnished by U.S. Mail to **Scott K. Tozian, Esquire**, Smith & Tozian, P.A., 109 North Brush Street, Suite 200, Tampa, Florida 33602-4163 this 15th day of June, 2006.

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